



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

FITSUM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant
Nicole Washienko, OSLA

Counsel for the Respondent:
Sandra Baffoe-Bonnie, OES/ECA
Amboko Wameyo, OES/ECA

Introduction

1. The Applicant serves as a Human Resources Officer at the United Nations Economic Commission for Africa (ECA) at the NOC-5 level. On 28 October 2014, she filed an application contesting a decision dated 16 April 2014 not to pay her a Special Post Allowance (SPA) for the period 1 December 2009 to 10 May 2011.

2. The Respondent filed a reply to the application on 1 December 2014.

3. Vide Order No. 241 (NBI/2015) dated 22 July 2015, the proceedings in the case were suspended until 31 August 2015 as the parties sought to resolve the dispute through informal means.

4. On 31 August 2015, the parties filed a joint motion informing the Tribunal that they had been unable to arrive at an amicable solution to the dispute and requested the Tribunal to reopen proceedings.

5. The Tribunal heard the case from 12 to 13 July 2016.

6. The Tribunal having carefully reviewed all of the parties' submissions considers it necessary to make a determination on the issue of receivability.

Facts

7. The Applicant joined ECA in 1997 as a Human Resources Assistant, at the G-3 level. She was promoted several times and became a Senior Human Resources Assistant at the G-7 level in 2008. She is currently a Human Resources Officer on a National Officer post in the Human Resources Services Section (HRSS).

8. On 10 May 2009, Ms. Arthi Gounder, who was then a Human Resources Officer in HRSS at ECA, went on maternity leave/annual leave. During an HRSS meeting that took place prior to Ms. Gounder's departure, the Applicant was asked by Ms. Susan Mokonyana, then-Chief, HRSS, to perform all of the duties of a human

resources officer in HRSS. These duties, which commenced on 11 May 2009, included *inter alia*, acting as team leader within HRSS and exercising certifying authority for one of HRSS's sub-units through the end of 2009.

9. In light of the higher level responsibilities that the Applicant assumed, on 18 August 2009, Ms. Mokonyana wrote to the Office of Human Resources Management (OHRM) to request that the Applicant be placed on a P-level post for the purpose of granting her an SPA at the P-2 level.

10. On 4 October 2010, OHRM approved the SPA for the Applicant at the P-2 level for the period of 11 May 2009 to 30 November 2009, that is, the period of Ms. Gounder's absence.

11. On 1 June 2011, the Applicant went on Special Leave Without Pay (SLWOP). While the Applicant was on SLWOP, the P-3 post against which her SPA had been charged was filled. Upon the Applicant's return from SLWOP, the higher level functions that she had been performing were discontinued.

12. On 5 September 2011, the Applicant wrote an interoffice memorandum to Mr. Amaresarwa Rao, Chief of HRSS, copying Ms. Doreen Bongoy-Mawalla, then-Director of Administration, requesting an extension of her SPA at the P-2 level from 1 December 2009 to the then-present time to account for the additional functions that she had been performing.

13. On 15 January and 18 February 2014, on behalf of the Applicant, the Office of Staff Legal Assistance (OSLA) wrote an interoffice memorandum to Mr. Rao requesting an extension of the Applicant's SPA for the period from 1 December 2009 to 10 May 2011.

14. On 16 April 2014, Mr. Rao sent an email to the Applicant's OSLA counsel rejecting the Applicant's request for an extension of her SPA.

15. On 16 April 2014, the Applicant filed a management evaluation request contesting the Administration's decision not to grant her SPA for the period of 1 December 2009 to 10 May 2011.

16. On 30 July 2014, the Applicant received the management evaluation, upholding the Administration's decision.

Respondent's case

17. The Applicant's case is not receivable.

a. The Applicant is claiming SPA for the period 1 December 2009 to 10 May 2011. She made this request for the first time, on 5 September 2011, more than 20 months after the date when she ought to have requested for SPA as per the provision of staff rule 3.17(ii). The Applicant testified that she was aware that the payment of SPA to her had been stopped upon the return of Ms. Gounder, therefore she had as from 1 December 2009 to 1 December 2010 as the appropriate time to file her request for SPA but she did not.

b. The Applicant testified with reference to her extended and exemplary record and experience in Human Resources and that part of her work was to review and advice on the granting of entitlements including SPA and if the requests were in line with the regulations and rules. Therefore, with this experience, the Applicant ought to have known that a request for any retroactivity of payments as is in her case, had to comply with staff rule 3.17(ii) but her request was filed nine months late.

c. In her application, the Applicant argues that section 7.3 of ST/AI/1999/17 which provides that SPA can be extended for up to two years is an exception to staff rule 3.17. The Respondent submits that section 7.3 is by no means an exception to the requirement of staff rule 3.17 and cannot be considered as such, unless specifically stipulated. This is because in the order of hierarchy of norms the staff rules are hierarchically superior to the

administrative instructions and as such an exception to a superior norm cannot be legislated for in an inferior norm.

d. In making its determination on the issue of receivability and if the staff rule and the administrative instruction are in conflict, the Tribunal should consider the jurisprudence of the Appeals Tribunal in *Couquet* 2015-UNAT-574, which found that in case of conflict between the two, the staff rules would take precedence.

e. The Applicant in her testimony said that she made verbal requests for extension of the payment of her SPA to her FRO and the Chief HRSS and that they promised her that they were looking into it. However both Mr. Rao and Ms. Gounder testified that they did not have verbal discussions with the Applicant regarding the payment of SPA. Additionally, even if this were so, the Applicant had to submit her written claim for retrospective payment of SPA within one year from the date she would have been entitled to it, i.e. between 1 December 2009 and 1 December 2010.

f. The Tribunal has held in *Mezoui* 2010-UNAT-043 and *Roman* 2013-UNAT-308 that there is the need to strictly enforce the various time limits in asserting one's rights. As an exception to time limits, a staff member has to prove that circumstances beyond her control led to the delay in requesting payment. However, the Applicant does not provide any evidence as to why she had delayed in making a request for retroactive payment of SPA. There is therefore no basis upon which the Applicant's claim should be considered receivable because it is time barred and no evidence has been availed by the Applicant demonstrating that she submitted her claim within one year following the date on which she would have been entitled to the initial payment as required by staff rule 3.17 (ii).

g. The Applicant failed to pursue the procedures available to her for the protection of her rights within the stipulated time-limits thereby making her application time barred.

18. The Applicant did not perform higher level functions as from 1 December 2009 to 10 May 2011 to warrant the payment of SPA.

a. It is undisputed that the Applicant was asked to perform higher level functions from 11 May 2009 to 30 November 2009 during which period her FRO was away on combined maternity and annual leave.

b. However, as from 1 December 2009 the Applicant ceased to perform the higher level functions because her FRO had returned and had taken up her full functions. In the preparation of the Applicant's 2010-2011 ePAS, it can be seen that the Applicant assumed that she was an Associate Human Resources Officer at the P-2 level, as can be seen from the email exchange with her FRO. The communication from her FRO was a clear indication to the Applicant that she was not performing any higher functions since the return of the said FRO.

c. Both the Applicant and the FRO testified that no response was given to this email yet this was the opportune moment for the Applicant to explain to her FRO that she believed that she was performing higher level functions which should be recognised in her ePAS for 2010-2011.

d. The Applicant testified that her higher level functions continued even with the return of her FRO. An examination of the Applicant's ePAS for the 2009/2010 cycle shows a stark difference to her ePAS for 2010/2011.

e. During her testimony, the Applicant stated that she was asked to perform higher level functions even after the return of her FRO but the people she named as having allegedly asked her to perform higher level functions both denied asking her to do so. Ms. Gounder, the Applicant's FRO testified

that the Applicant never informed her that she was performing higher level functions even after her return. Mr. Rao also testified that he never asked the Applicant to perform any higher level functions upon the return of Ms. Gounder. As far back as May 2014, Ms. Gounder wrote to Mr. Rao stating that she did not ask the Applicant to perform higher level functions.

f. There is no documentation in support of the Applicant's claim that she was asked to perform higher level functions as from 1 December 2009 to 10 May 2011. If indeed the Applicant was asked to perform higher level functions, this would have to be documented in writing otherwise there would be no justification for SPA payment.

g. Additionally, as testified to by Mr. Rao, the key requirements for the payment of SPA are the existence of a vacant post at a higher level and also the selection of a staff member competitively to the post. During the period in question, there was no vacant post. In as much as there can be a waiver in issuing of a vacancy announcement, the existence of a vacant position is mandatory, so that a staff member can actually claim to perform the functions of the vacant post. The Applicant does not indicate which post's functions she was carrying out for her to be eligible for SPA and this is because there was no vacant post and it is absurd for the Applicant to claim that she was carrying out the full functions of her FRO even after her return.

Applicant's case

19. The rule against retroactive payments should not preclude her ability to receive SPA.

a. ECA cannot properly rely on staff rule 3.17(ii) to deny the Applicant an extension of her SPA for the additional duties performed. Section 7.3 of ST/AI/1999/17 specifically provides that SPA may be extended by the relevant department or office without reference to the SPA panel to cover a

total period of up to two years, including the initial period, upon the supervisor's certification that the staff member continued to satisfactorily perform the full functions of the higher-level post.

b. Applying section 7.3 to the present case, the Applicant's SPA should be extended for a total period of two years, until 10 May 2011, since pursuant to her supervisor's requests, the Applicant continued to perform the full functions that she had been performing in Ms. Gounder's absence after the latter's return. The Applicant's supervisors confirmed that she continued to excel in performing these functions during this period.

c. The Applicant meets the requirements for an extension of her SPA by ECA and it is within ECA's discretion to grant this to the Applicant without reference to an SPA panel. Since there is no doubt that ECA benefitted from the Applicant's excellent performance of the higher-level functions, ECA should not be permitted to rely on staff rule 3.17(ii) to deny her this entitlement. Basic principles of good faith and fair dealing require ECA to extend her SPA.

d. Although the Applicant first made a written request for the extension of her SPA in September 2011, she did not receive a final response from the Administration until 16 April 2014, more than two and half years after her initial written request, and only after numerous follow-up queries by the Applicant and her counsel. Equity and fairness dictate that the Administration cannot deny her entitlement to the claimed compensation based upon the timeliness of a written request when the Administration itself took an inordinate amount of time to respond to her.

e. Even if ECA could rely on staff rule 3.17(ii) in response to the Applicant's request for SPA, she would still be entitled to SPA for approximately nine months in relation to the higher-level functions of Human Resources Officer that she continued performing after Ms. Gounder's return

to ECA. Staff rule 3.17(ii) provides that staff members shall not be entitled to retroactive payments if they did not make a written claim for the payment within one year of the entitlement. Since the Applicant wrote to Mr. Rao on 5 September 2011 requesting an extension of her SPA, she should at least be entitled to SPA for the higher-level functions that she performed from 6 September 2010 to 31 May 2011, when she ceased performance of these functions to go on Special Leave without Pay.

Considerations

20. Staff rule 3.17(ii) provides as follows:

Retroactivity of payments

A staff member who has not been receiving an allowance, grant or other payment to which he or she is entitled shall not receive retroactively such allowance, grant or payment unless the staff member has made written claim:

(i) In the case of the cancellation or modification of the staff rule governing eligibility, within three months following the date of such cancellation or modification;

(ii) In every other case, within one year following the date on which the staff member would have been entitled to the initial payment.

21. Sections 7.1 to 7.3 of ST/AI/1999/17 (Special post allowance) provide as follows:

Duration and extension of SPAs

7.1 SPAs shall be granted for a specific period determined in accordance with the provisions of the present section.

SPA for assignment to a temporarily vacant post

7.2 When an SPA is granted to a higher-level post which is temporarily vacant, it may be granted for an initial period of up to one year.

7.3 The SPA may be extended by the department or office without reference to the SPA panel to cover a total period of up to two years, including the initial period, upon the supervisor's certification that the staff member continues to satisfactorily perform the full functions of the higher-level post.

22. It is the Respondent's case that the application is not receivable because the Applicant made her claim for SPA for the period in question, 1 December 2009 to 10 May 2011, for the first time on 5 September 2011, more than 20 months after the date when she ought to have requested for SPA as per the provisions of staff rule 3.17(ii).

23. On the other hand, the Applicant contends that ECA cannot properly rely on staff rule 3.17(ii) to deny an extension of her SPA for the additional duties performed because section 7.3 of ST/AI/1999/17 specifically provides that SPA may be extended by the relevant department or office without reference to the SPA panel. The Applicant further contends that since there is no doubt that ECA benefitted from her excellent performance of the higher-level functions, ECA should not be permitted to rely on staff rule 3.17(ii) to deny her this entitlement.

24. Finally, the Applicant submits that since she wrote to Mr. Rao on 5 September 2011 requesting an extension of her SPA, she should at least be entitled to SPA for the higher-level functions that she performed from 6 September 2010 to 31 May 2011, when she ceased performance of these functions to go on SLWOP.

25. The evidence before the Tribunal is that, on 4 October 2010, OHRM at the United Nations Headquarters in New York addressed an email titled "Requests for retroactive SPAs for ECA staff members" to the ECA Administration (annex 4 to the application). Part of the email stated:

Your memorandum of 2 September 2010 to Ms. Catherine Pollard on the above mentioned subject refers.

I am pleased to advise that OHRM has approved your request for the staff members listed in the attached *Matrix.

As you are aware, your request was based on the recommendation provided by OHRM Management Support Mission undertaken in October/November 2009. The approval is on a one-time exceptional basis on the understanding

that future requests of this nature will not be entertained under any circumstances.

We have noted that HRSS have undertaken measures to correct the situation at hand and understand that guidelines on granting of SPAs and filling of posts have been established...

The Applicant's name was on the Matrix referred to in the email.

26. Pursuant to staff rule 3.17(ii), the Applicant was required to make a written claim to receive retroactive SPA "within one year following the date on which [she] would have been entitled to the initial payment". This request should have been made within one year of 1 December 2009, that is, by or before 1 December 2010. However, it was only on 5 September 2011 that the Applicant wrote an interoffice memorandum to Mr. Rao, copying Ms. Bongoy-Mawalla, requesting an extension of her SPA at the P-2 level from 1 December 2009 to the then-present time to account for the additional functions that she had been performing (Annex 5 to the application). The Applicant submitted the claim outside the statutory timeline and is clearly out of time.

27. Section 7.3 requires that for SPA to be extended by the department or office without reference to the SPA panel, the supervisor must certify that the staff member continued to satisfactorily perform the full functions of the higher-level post. The evidence tendered to the Tribunal by the Applicant's supervisors does not support the Applicant's contentions that she was asked to perform higher level functions. The Applicant has not tendered any documentation nor is there any paper trail to justify such a claim and payment.

28. The Tribunal, in this respect also takes into consideration the email dated 4 October 2010 in which OHRM stressed to the ECA administrators that the approvals of SPA had been given on "a one-time exceptional basis on the understanding that future requests of [that] nature [would] not be entertained under any circumstances".

Judgment

29. The Applicant failed to comply with staff rule 3.17(ii) by failing to make a claim seeking retroactive payment of SPA in a timely manner. The application is refused as not receivable. Further the Applicant has not given evidence to show that she continued to perform higher level functions even after her supervisor some of whose functions she had taken on returned from leave.

(Signed)

Judge Nkemdilim Izuako

Dated this 26th day of April 2017

Entered in the Register on this 26th day of April 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi